No. 14999.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK ROSS,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

The jurisdiction of the Court of Appeals to review the Order of the District Court herein is conferred by Title 28, U. S. Code, §1292(1).

The Complaint herein for breach of contract was filed by appellant in the United States District Court for the Southern District of California, Central Division, on September 1, 1955 [Tr. pp. 3-47].* The Answer thereto was filed by appellee on October 20, 1955 [Tr. pp. 49-57]. It affirmatively appears from the Complaint herein that plaintiff, Frank Ross, is a citizen of the State of California [Tr. p. 3] and that defendant, Twentieth Century-Fox

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*Whenever reference is made to the Transcript of Record, the legend "Tr." followed by appropriate page number will be employed.

Film Corporation is a corporation organized under and pursuant to the laws of the State of New York and therefore a citizen of that State [Tr. p. 4]. The amount in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000.00 [Tr. p. 3]. Jurisdiction of the United States District Court was conferred by Title 28, U. S. Code, §1332(a)(1).

The Order of the District Court from which this appeal is taken [Tr. p. 66] was entered on November 29, 1955. Said Order constitutes an order staying the trial of the action herein on the application of appellee pursuant to Title 9, U. S. Code, §3. Such Order in an action at law as for breach of contract has been held to be in effect an interlocutory order granting an injunction and is appealable by reason of the provisions of Title 28, U. S. Code, §1292(1).*

Appellant served and filed his Notice of Appeal therefrom on December 8, 1955 [Tr. p. 67].

Statement of the Case.

The questions involved in this appeal and the manner in which they are raised are the following:

On August 11, 1952, appellant's predecessor in interest sold to defendant Twentieth Century-Fox Film Corporation (sometimes hereinafter referred to as "Fox") by written agreement of sale [Tr. pp. 17-43], certain rights, therein more particularly described, in and to a projected motion picture entitled "The Robe." Under the terms of the agreement of August 11, 1952, appellant, as successor in interest to the parties therein described as "Sellers," was

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**Baltimore Contractors, Inc. v. Bodinger,* 348 U. S. 176 (1955).

to receive as consideration for the sale a sum based upon a percentage of the net profit, as defined in the agreement, of the motion picture photoplay.

Under the terms of paragraph XIX(h)(3) of the agreement of sale [Tr. pp. 38-39] any controversy arising between the parties to the agreement "as to any accounting" was required to be submitted to certified public accountants in the City of New York, whose decision was to be final and binding upon the parties.*

The agreement of sale provided mechanics for ascertaining net profit as to which appellee's percentage interest was to attach [Tr. pp. 31-35]. Said mechanics are spelled out in detail in the Complaint [Tr. pp. 10-13] and may be epitomized as follows: Net profits were defined as the amount remaining after there should have been deducted from the "gross receipts" of the photoplay, the "distribution fees" of Fox, the "distribution expenses" of Fox, and the "negative cost" of the photoplay. Each of the quoted terms hereinabove enumerated was itself defined with par-

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*"3. In case any controversy shall arise between the parties hereto *as to any accounting* by Purchaser with respect to the share of Pictures in the net profits of the Picture, the questions in controversy shall be submitted for arbitration to certified public accountants in the City of New York, acceptable to the parties hereto, and in the event of the failure of the parties to agree upon such firm of accountants, then said controversy shall be submitted for determination to such national firm of accountants in New York City as shall be designated by the American Arbitration Association in that city. Each party shall be given a reasonable opportunity, under all circumstances, to submit its views to an arbitrator, and a copy of each communication sent by either party to the arbitrator shall be sent to the other party. The arbitrator may also secure advice and information independently. The decision of the arbitrator shall be final and binding upon the parties hereto. The costs of any arbitration, pursuant to this Article, shall be divided between the parties in such manner as shall be determined by the arbitrator." (Emphasis added.)

ticularity in the agreement and in the Complaint [Tr. *loc. cit.*].

In the Complaint, appellant asserted that overhead charges to negative cost of the photoplay were to be computed in the same manner as the same would have been computed had the photoplay been produced by Universal Pictures Corporation, and that under no circumstances were overhead charges to exceed 25% of direct charges. In that connection, the Court's attention is invited to paragraph XIX(c) of the Agreement of Sale [Tr. p. 32].

In his Complaint, appellant asserted that overhead charges represented 51.695% of the direct costs of the motion picture, after adjustments, and that an institutional expense of $5,000 for a Cinemascope lens had been included as part of the negative cost.

In addition, appellant asserted that appellee had charged as expenses of distribution, the cost of the development and exploitation of appellee's Cinemascope process, a cinematographic innovation developed by appellee. Appellant took the position that the expenses of appellee in the exploitation of its new process were not properly chargeable as expenses of distribution of this particular photoplay, and that the inclusion of such expenses which appellant believes, and hopes to prove, to be institutional expenses, as a portion of the distribution expense of "The Robe," is a breach of the agreement of August 11, 1952. *Appellant did not and does not question the amount of such charges or the accounting procedures followed by appellee in making them.* Appellant's case on the merits involves the pure legal question of whether the agreement, as drawn, contemplates that appellant shall bear such charges.

The Court's attention is respectfully invited to the Complaint and to the Agreement of Sale for the particulariza-

tion of appellant's contentions hereinabove epitomized in compliance with Rules of the United States Court of Appeals, Ninth Circuit, 18(c).

On October 20, 1955, appellee filed its Answer to the Complaint [Tr. pp. 49-57], as well as its Notice of Motion to stay proceedings [Tr. p. 48]. The motion was placed on the calendar for hearing on November 21, 1955, adjourned on the Court's motion to November 28, 1955, and heard on said latter date. Thereafter, on November 29, 1955, an Order was entered granting said motion to stay proceedings [Tr. p. 66], and appellant appealed from said order.

Specification of Errors.

It is respectfully submitted that the court below erred in the following specified particulars:

1. In making and entering the Order herein appealed from which stays proceedings in this action.

2. In determining that the Agreement of Sale of August 11, 1952, is an agreement for arbitration.

3. In determining that the Agreement of Sale of August 11, 1952, is an agreement involving commerce within the meaning and scope of Title 9, U. S. Code.

4. In determining that all or any of the issues in this action are referable to the agreement for arbitration, assuming, *arguendo,* that the agreement of August 11, 1952, is an agreement for arbitration within the meaning of Title 9, U. S. Code.

5. In determining that appellee was not in default in proceeding with arbitration, and therefore not disenabled to raise the provisions of Title 9, U. S. Code, §3.

Summary of Argument.

The effect of the Order below is to impose upon parties to an agreement a provision for arbitration to which they did not agree, and to construe an act of Congress, limited by its terms to the regulation of maritime contracts and contracts involving interstate commerce to extend to a wholly intrastate transaction. Further, it requires the submission to certified public accountants of issues of law which the parties did not intend should be resolved by extrajudicial determination, at the instance of a party which is itself in default in proceeding with arbitration.

I.

Title 9, U. S. Code, Has Application Only to Contracts Reflecting Maritime Transactions or Evidencing Transactions Involving Interstate Commerce. The Agreement in Suit Is Neither a Contract Reflecting a Maritime Transaction nor Evidencing a Transaction Involving Interstate Commerce.

II.

Whether or Not the Contract Here in Suit Is a Contract for Arbitration Is a Question of State Law. The Applicable State Law Is That of California. Under California Law the Contract Is Not an Agreement for Arbitration.

III.

None of the Issues in This Action Are Referable to Arbitration Under the Agreement.

IV.

Appellee Is in Default in Proceeding With Arbitration, and Therefore Disenabled to Raise the Provisions of Title 9, U. S. Code, §3.

ARGUMENT.

I.

Title 9, U. S. Code, Has Application Only to Contracts Reflecting Maritime Transactions or Evidencing Transactions Involving Interstate Commerce. The Agreement in Suit Is Neither a Contract Reflecting a Maritime Transaction nor Evidencing a Transaction Involving Interstate Commerce.

It was at one time argued that while Title 9, U. S. Code, §2, made enforceable arbitration agreements in maritime transactions and in transactions involving commerce, that Title 9, U. S. Code, §3, empowered the United States District Courts to stay proceedings where any agreement for arbitration was involved, even though the agreement did not relate to a maritime transaction or a transaction in interstate commerce. In recent years this contention has been consistently rejected by the courts and has finally been laid to rest by the Supreme Court of the United States.

Bernhardt v. Polygraphic Co. of America, Inc., ... U. S. ....., 76 S. Ct. 273 (Jan. 16, 1956).

See, also:

Tejas Development Co. v. McGough Bros., et al., 165 F. 2d 276, 278-279 (5 Cir., 1948);

Tenney Engineering, Inc. v. United Electrical R. & M. Workers, 207 F. 2d 450, 454 (3 Cir., 1953) [dictum contained in footnote];

Sturgis, "Arbitration Under the United States Arbitration Act," 17 Law & Contemporary Problems, 580, 600-604 (1952).

The recent decision of the Supreme Court of the United States in *Bernhardt v. Polygraphic Company of America, Inc., supra,* would appear finally to dispose of the contention hereinabove set forth. In that case, which had been removed to the United States District Court by reason of diversity of citizenship, the contract whereunder the plaintiff was employed as the superintendent of defendant New York corporation's lithograph plant in Vermont contained a true arbitration clause. Vermont law makes revocable an agreement to arbitrate at any time before an award is actually made. The defendant attempted to invoke Title 9, U. S. Code, §3. The motion was denied by the United States District Court. The Court of Appeals reversed (218 F. 2d 1948). The case came to the Supreme Court of the United States on petition for certiorari which was granted because of the doubtful application by the Court of Appeals of *Erie R. Co. v. Tompkins,* 304 U. S. 64.

The Court, Mr. Justice Douglas, held that no maritime transaction was involved, nor did the contract evidence "a transaction involving commerce" within the meaning of Section 2 of the United States Arbitration Act. It held further that the conclusion of the Court of Appeals that Section 3 of the Act stands on its own footing was erroneous, stating (76 S. Ct. at pp. 275-276):

> ". . . We disagree with that reading of the Act. Sections 1, 2, and 3 are integral parts of a whole. To be sure, §3 does not repeat the words 'maritime transaction' or 'transaction involving commerce,' used in §§1 and 2. But §§1 and 2 define the field in which Congress was legislating. Since §3 is a part of the regulatory scheme we can only assume that the 'agreement in writing' for arbitration referred to §3 is the kind of agreement which §§1 and 2 have brought under federal regulation. There is no in-

timation or suggestion in the Committee Reports that §§1 and 2 cover a narrower field than §3. On the contrary, S. Rep. No. 536, 68th Cong., 1st Sess. p. 2, states that §1 defines the contracts to which 'the bill will be applicable.' And H. R. Rep. No. 96, 68th Cong., 1st Sess., p. 1, states that one foundation of the new regulating measure is 'the Federal control over interstate commerce and over admiralty.' If respondent's contention is correct, a constitutional question might be presented. *Erie R. Co. v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449, applied the Federal Act in a diversity case. But that decision antedated *Erie R. Co. v. Tompkins;* and the Court did not consider the larger question presented here—that is, whether arbitration touched on substantive rights, which *Erie R. Co. v. Tompkins* held were governed by local law, or was a mere form of procedure within the power of the federal courts or Congress to prescribe. Our view, as will be developed, is that §3, so read, would invade the local law field. We therefore read §3 narrowly to avoid that issue. *Federal Trade Commission v. American Tobacco Co.,* 264 U. S. 298, 307. We conclude that the stay provided in §3 reaches only those contracts covered by §§1 and 2."

Mr. Justice Douglas then went on to consider whether, apart from the United States Arbitration Act, a provision of a contract providing for arbitration is enforceable in a diversity case. He concluded that its enforceability depends upon the substantive law of the forum,

in accordance with the doctrine of *Erie R. Co. v. Tompkins, supra.* In that connection, the following was said (*supra,* 76 S. Ct. at pp. 276-277):

> "The Court of Appeals, in disagreeing with the District Court as to the effect of an arbitration agreement under *Erie R. Co. v. Tompkins,* followed its earlier decision of *Murray Oil Products Co. v. Mitsui & Co.*, 146 F. 2d 381, 383, which held that, 'Arbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master, or an "advisory trial" under Federal Rules of Civil Procedure. . . .'
>
> "We disagree with that conclusion. We deal here with a right to recover that owes its existence to one of the States, not to the United States. The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet in spite of that difference in procedure, the federal court enforcing a state-created right in a diversity case is, as we said in *Guaranty Trust Co. v. York,* 326 U. S. 99, 108, in substance 'only another court of the State.' The federal court therefore may not 'substantively affect the enforcement of the right as given by the State.' *Id.,* 109. *If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State.* The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference

in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1 Art. 12th of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a tiral-all as discussed in *Wilko v. Swan,* 346 U. S. 427, 435-438. We said in the York case that 'The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result.' 326 U. S. 109. There would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont Court could not be." (Emphasis added.)

We believe it entirely clear, and respectfully submit, that the contract in suit involves neither a maritime contract nor interstate commerce and that the United States Arbitration Act, Title 9 U. S. C. is without application

The Agreement of Sale of August 11, 1952, is a contract made in California, to be performed in California. It is a simple agreement for the sale of personal property (*Herwig v. The United States,* 105 F. Supp. 384 (Ct. of Claims, 1952)), and in no sense involves interstate commerce.

The mere fact that an intrastate sale involves goods which originate in or may ultimately find their way into

interstate commerce does not render the sale itself a transaction in interstate commerce.

Spencer v. Sun Oil Co., 94 F. Supp. 408 (D. C., D. Conn., 1950);

Libby, McNeill & Libby v. Libby, 103 F. Supp. 968 (D. Mass., 1952);

R. P. Hazzard Co. v. Emerson's Shoes, 89 F. Supp. 211 (D. C., D. Mass., 1950);

C. S. Smith Metropolitan Market Co. v. Food & Grocery Bureau of Southern California, 33 F. Supp. 539 (D. C., S. D. Cal., 1939).

Spencer v. Sun Oil Co., 94 F. Supp. 408 (D. C., D. Conn., 1950), involved an antitrust action under the Robinson-Patman Act. It was held that sales of gasoline at retail did not involve interstate commerce, the court stating at page 411:

> "The question of whether the retail sales by the individual dealers to their customers constitutes interstate commerce involves other considerations. The moment the gasoline is delivered to the dealer's filling station, title thereto passes to him. As an independent merchant, he has complete control over the process of merchandising. He is in much the same position as a retail grocer, some of whose products are derived from outside the state; such a merchant is not engaged in interstate commerce because the moment the products reach his shelves 'they come to rest and cease to be "in the flow" of interstate commerce'. Smith Metropolitan Market Co. v. Food and Grocery Bureau of Southern California, D. C., 1939, 33 F. Supp. 539, 540; A. L. A. Schechter Poultry Corp. v. U. S., 1935, 295 U. S 495, 55 S Ct 837, 79 L Ed. 1570. The retail sales of gasoline are trans-

actions consummated locally, involving a commodity which had been previously siphoned-off from the current of commerce and brought to rest within the state. Mid-Continent Petroleum Corp. v. Keen, 8 Cir., 1946, 157 F. 2d 310. These transactions are intrastate in nature and not within the purview of the Robinson-Patman Act.

"The plaintiffs have suggested that the retail sales acquire the attributes of interstate commerce since many of the customers are transients who travel over state lines and commercial users who are engaged in interstate transportation businesses. They have not referred to any authority to support their argument and *it would seem that what would otherwise be a purely intrastate transaction cannot be transformed into a transaction in interstate commerce merely because the commodity sold is taken by the purchaser across state lines and used in another state.*" (Emphasis added.)

C. S. Smith Metropolitan Market Co. v. Food & Grocery Bureau of Southern California, 33 F. Supp. 539, D. C., S. D. Cal. (1939), was an antitrust action in which Judge Yankwich held that a retailer of food was not engaged in interstate commerce, stating at page 540:

"The plaintiff is a California corporation, engaged solely in the business of selling and distributing food, groceries and allied articles of merchandise at retail in various retail stores owned and maintained by it in the cities of Los Angeles, Long Beach, Lynwood and Compton, all in the County of Los Angeles, California.

"Assuming that some of the products on its shelves are imported from other states, the moment they reach its shelves, they come to rest and cease to be 'in

> the flow' of interstate commerce. Schechter Poultry Corp. v. United States, 1935, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; Southern Pac. Co. v. Gallagher, 1938, 306 U. S 167, 59 S Ct. 389, 83 L. Ed. 586.
>
> "As they are not subject to regulation by the Congress in that condition, they are not within the contemplation of the Sherman Anti-Trust law, 15 U. S. C. A., §§ 1-7, 15 note, or any other anti-trust statute aiming to prohibit certain practices in interstate commerce."

The acquisition of rights to produce a motion picture must, we respectfully submit, be carefully distinguished from the actual distribution of the motion picture in its produced form.* While the latter may well be a transaction or series of transactions in interstate commerce, the former, which consists of an isolated occasional transaction wholly intrastate in its geography and character is not.

The transaction involved in the present case is no more an interstate transaction than the agreement involved in *Bernhardt v. Polygraphic Co. of America, Inc., supra,* which contemplated the departure of a New York resident for Vermont where he was to take up supervision of a product designed for interstate commerce, or a contract for the paving of streets in Texas by a Minnesota firm,

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*Not every transaction concerning the motion picture industry involves interstate commerce. See, *e. g.: Tad Screen Advertising, Inc. v. Oklahoma Tax Commission,* 126 F. 2d 544 (C. C. A. 10, 1942; *Boynton v. Fox West Coast Theatres Corp.,* 60 F. 2d 851 (C. C. A. 10, 1932).

held intrastate within the meaning of the United States Arbitration Act in *Tejas Development Co. v. McGough Bros., et al., supra.*[1]

II.

Whether or Not the Contract Here in Suit Is a Contract for Arbitration Is a Question of State Law. The Applicable State Law Is That of California. Under California Law the Contract Is Not an Agreement for Arbitration.

We believe it clear from *Bernhardt v. Polygraphic Company of America, Inc., supra,* that whether or not the agreement of sale is a contract for arbitration is, under the doctrine of *Erie R. Co. v. Tompkins, supra,* a question to be resolved by the application of the principles of substantive state law. The contract was made in California, to be performed in California, and we believe it clear that the state law having application is that of California.

Under the law of California, whether or not an agreement is for arbitration is governed by the intention of the parties, and the use of the word "arbitration" in an agreement is in nowise controlling as to whether the agreement is one for arbitration or not.

Rives-Strong Building v. Bank of America, 50 Cal. App. 2d 810, 817, 123 P. 2d 942 (1942);

Thompson v. Newman, 36 Cal. App. 248, 251, 171 Pac. 982 (1918).

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[1]Section 1 of the United States Arbitration Act (Title 9, U. S. Code, Sec. 1) defines commerce as that term is used in the Act as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, . . ."

The transaction here involved, we respectfully submit, is not encompassed within the foregoing definition.

In *Rives-Strong Building v. Bank of America, supra,* at page 817 of the official report, the following statement appears:

> "Turning to the lease itself to determine what the parties intended, we find a very simple wording, with no conditions or restrictions placed upon the persons named, no method of procedure suggested and no hearings or notices mentioned. In fact, the provision is so aptly worded for the purpose of requiring a mere appraisal or valuation that if the word 'appraiser' is substituted for the word 'arbitrator' in the lease no serious contention could be made that the parties intended it to be a statutory arbitration agreement. *The use of the word 'arbitrator' is of course not controlling.* (Thompson v. Newman, 36 Cal. App. 248, 251 [171 Pac. 982].) Particularly is this true in view of the almost interchangeable manner in which these terms are commonly used in agreements." (Emphasis added.)

In *Thompson v. Newman,* the following appears, *supra,* 36 Cal. App. 251:

> "True, the contract in terms specifically uses the word 'arbitrators,' but that fact does not conclusively control the construction of the agreement. (Foster v. Carr, 135 Cal. 86 [67 Pac. 43].) The term 'arbitrators' evidently was incorrectly employed to designate the character and capacity of the men who had been, or might be, agreed upon to carry out the terms of a contract which, when read in its entirety, purported to provide for nothing more nor less than a mere appraisement."

It is the substance of the agreement, rather than what the parties call it, which will govern as to whether the agreement is one for arbitration.

Bewick v. Mecham, 26 Cal. 2d 92, 97, 156 P. 2d 757 (rehg. den. 1945);

Rives-Strong Building v. Bank of America, supra;

Thompson v. Newman, supra.

In attempting to ascertain the intention of the parties as to whether the agreement is one for arbitration, the courts judge the agreement by two criteria: They ask first, whether the parties intend a quasi-judicial hearing, with an opportunity to offer evidence, or whether on the contrary they intend that the Referee shall use his own judgment in arriving at the decision; and secondly, whether the Referee is to adjudicate a controversy or whether he is merely to make a determination which will avoid one.

Omaha v. Omaha Water Co., 218 U. S. 180, 195 (1910);

Bewick v. Mecham, supra;

Rives-Strong Building v. Bank of America, supra;

Dore v. Southern Pacific Company, 163 Cal. 182, 189, 124 Pac. 817 (1912);

M. E. Church v. Seitz, 74 Cal. 287, 291-293, 15 Pac. 839 (1887).

In *Bewick v. Mecham, supra,* a situation not unlike that presently before the Court was presented. The parties had agreed that the defendant would purchase property held under lease at a price subsequently to be fixed. Machinery to submit the price "to arbitration" was set forth in the event the parties were unable to agree upon a price. Plaintiff sued for specific performance and the defendant

moved for a stay pending arbitration. The Supreme Court of California declined to stay, holding that the agreement was not one for arbitration and therefore not susceptible to stay. The language of the Court is illuminating (*supra,* 26 Cal. 2d at page 97):

> "There is nothing in the agreement to indicate that the arbitrators were to take evidence in a formal proceeding as a basis for their decision rather than their own opinion and judgment."

The Court's reasoning was that the California Arbitration Act, which is similar to the United States Arbitration Act (Title 9 U. S. C. as compared with Sections 1280 *et seq.* of the Code of Civil Procedure of the State of California) had no application unless the agreement was one for arbitration in the strict sense of the word. In determining whether the agreement was for arbitration, the Court took the view that an agreement for arbitration contemplates the resolution of a controversy arising out of the agreement or the resolution of a controversy as to the refusal of the parties to perform the agreement and not merely the ascertainment of a fact or facts, which, once ascertained, may have the effect of avoiding controversy. The Court went on to point out that even where the agreement measured up to the first criterion, it was necessary also that the agreement contemplate that the arbitrators base their decision upon evidence formally adduced and not upon their own opinion and judgment.*

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*It is clear that the approach of the California courts is consistent with that generally followed in the United States. In *Omaha v. Omaha Water Co.,* the Supreme Court of the United States stated (218 U. S. at p. 195):

". . . As already hinted, this was not a board of arbitrators. An arbitration implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied. The right to notice of hear-

Paragraph XIX(h)(3) of the Agreement of Sale (quoted in footnote, p. 3 of this brief) bears examination in the light of the foregoing. It does not contemplate a hearing but negates a hearing. It does not contemplate cross-examination of the evidence adduced, but negates cross-examination. It does not contemplate that the arbitrator shall arrive at his determination based on the evidence presented by the parties, *but specifically authorizes him to "secure advice and information independently."* This is not arbitration under the law of California.

We respectfully submit that an examination of the Agreement of Sale makes it apparent that the so-called arbitration clause goes only to accountings and not in any sense to the failure of the parties to perform the agreement or to improper performance. We believe it clear from the Complaint and from the contract that the only question to be submitted to the certified public accountants was that of the accuracy of the accounting or, stated otherwise, the purely ministerial, non-judicial task of inquiring into the correctness of the accounting from sound accounting principles. *Appellant does not question the accuracy of the accounting as measured by accounting standards.*

In *M. E. Church v. Seitz, supra,* the Supreme Court of California distinguishes arbitration from other proceed-

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ings, to produce evidence and cross-examine that produced is implied when the matter to be decided is one of dispute and difference. But when, as here, the parties had agreed that one should sell and the other buy a specific thing, and the price should be a valuation fixed by persons agreed upon, it cannot be said that there was any dispute or difference. Such an arrangement precludes or prevents difference, and is not intended to settle any which has arisen. *This seems to be the distinction between an arbitration and an appraisement, though the first term is often used when the other is more appropriate."* (Emphasis added.)

ings resembling arbitration in the following language (*supra,* 74 Cal. at pp. 291-292):

"There are two time-honored rules in relation to arbitrators, one that courts will not enforce an agreement to submit to arbitration, or in other words, that it can be revoked; and the other that arbitrators must give notice of their sessions so as to afford the parties a right to be heard. These rules rest upon the same idea, viz., that an arbitration is a substitute for proceedings in court. It being considered against sound policy to allow parties to deprive themselves of their right of resort to the courts, agreements to that effect are not binding so long as they are executory; but if the parties choose to resort to other tribunals, such tribunals are held to the more important rules which govern courts in their proceedings.

"It was found, however, that to apply the above rules to all agreements in which parties regulated their action by the determination of third persons would interfere with the ordinary transactions of mankind, and put unnecessary clogs upon business. Accordingly, in the well-considered case of Scott v. Avery, 5 H. L. Cas. 811, it was held that a condition in a policy of insurance in a mutual company that the loss should be 'ascertained and settled by the committee' was not a submission to arbitration in its proper sense, but was a condition precedent to the right of action. Similar decisions have been made in this and other states. (Citing cases.)

"These cases hold that a contract by which the value of property or the amount of damage is, for the purpose of the contract, to be fixed by third persons, is not a submission to arbitration, and therefore to enforce it does not trench upon the jurisdiction of the courts. Now, if this is so—if such a

> proceeding is not analogous to the investigation by a court of a controversy between the parties—why need it be conducted according to the rules which govern courts in their investigations? We think that it need not; that the proceeding is a mere appraisement or valuation, which, although binding upon the parties, is not the submission of a controversy to arbitration, and is, therefore, not subject to the rules which govern arbitrators. And to this effect are the best considered cases."

It should not be necessary to point out that the formality required of arbitrators is lacking in the procedure set forth in the agreement and that the agreement is therefore not subject to the rules which govern arbitrators.

In a very recent case, *Cheminol Corporation v. Ohlsson,* 133 Cal. App. 2d 223, 226, 283 P. 2d 773 (1955), the matter of an accounting was left to an independent certified public accountant. The case is almost on all fours with the instant case. Discussing the accountant, Mr. Justice Ashburn states (*supra,* 133 Cal. App. 2d at p. 226):

> ". . . He has been referred to as an arbitrator, but his function seems to be that of a third party employed to determine a fact with the understanding that his finding would bind the parties in interest, which falls short of an arbitration; see Dore v. Southern Pacific Co., 163 Cal. 182, 189, 124 Pac. 817] Bewick v. Mecham, 26 Cal. (2d) 92, 97, 156 Pac. (2d) 757; 137 A. L. R. 1277; . . ."

We respectfully submit that the position of the certified public accountants in the instant case is identical with that of the certified public accountant in the case last cited. It was not, and could never have been the intention of the parties to submit serious questions of law to certified pub-

lic accountants. On the contrary, it was clearly their intention to submit only questions of accounting to certified public accountants and to leave questions of law to the courts. *Otherwise, the agreement would have been drawn differently and the arbitration clause would not have been limited to questions "as to any accounting."*

The Court's attention is invited to the case of *Seldner v. W. R. Grace & Co.*, 22 F. Supp. 388, 392 (D. C. Md., 1938), where the United States District Court for the District of Maryland quotes with approval 3 *American Jurisprudence, Arbitration and Award,* Section 102, as follows:

> "An exception to the rule stated above in regard to holding meetings and hearing evidence is recognized in those cases in which the character of the matter submitted and of the arbitrators chosen is such as to justify an inference that they were selected to act as experts and to adjudge the matter from their own knowledge. Here it is not essential that the evidence shall have been heard unless the submission so provides. In the absence of such a provision in the submission, a refusal to receive testimony is not ground for setting aside the award. *It will be observed that under such circumstances, the proceeding is likely to be more in the nature of an appraisement than an arbitration.* . . ."

A particularly pertinent case arising in another jurisdiction, but construing the applicability of a statute similar in tone and effect to Title 9, U. S. Code, §3, and the California Arbitration Law, is that of *Shepard & Morse Lumber Co. v. Collins,* 198 Ore. 290, 296, 256 P. 2d 500, 503 (1953). The matter in issue was the extent of the plaintiff's injury, and it had been agreed that if either party was dissatisfied with the attending physician's determination, the matter would be referred to a three-

physician board. The injured party refused to submit the question to the board and brought suit immediately for his damage. The other party moved for a stay.

The Supreme Court stated the principal issue to be whether the agreement was a contract to arbitrate within the meaning of the statute. It pointed out, *supra,* 198 Ore. at page 296 that "verification of the performance of a contract, by third parties, is likely to be held to partake of the character of appraisals." It then held that the procedure established was an appraisement procedure and not a true arbitration within the sense of the statute and that, under the circumstances, a stay was not appropriate.

The Court relied on 6 *Williston on Contracts* (Rev. Ed.), Section 1921a, wherein the learned commentator points out that the true distinction between a contract for arbitration and a contract for appraisement lies in whether the umpires are to determine the ultimate liability of the parties or merely facts incidental thereto.

We believe it entirely clear, under the language of the agreement here in question, that the court is dealing with an agreement for appraisement and not for arbitration and that under all of the circumstances a stay is inappropriate. The agreement presently before the Court does not contemplate that the umpire shall determine the ultimate liability of the parties. It does not provide for formal hearings. It does not provide that the decision of the umpire shall be based upon the evidence adduced through the efforts of the parties, but affirmatively provides that the umpire may rely upon strangers to the proceeding for advice and information.

The agreement contemplates only the submission of the narrow question whether correct accounting procedures

have been followed, such submission to be to experts in the field of accounting. The agreement does *not* contemplate the adjudication of a controversy arising out of a contract, the *sine qua non* of an arbitration agreement.

The plaintiff, as hereinabove indicated, does not question the correctness of the accountings as matters of accounting. He is not asserting that monies shown in the statements as having been spent were not in fact spent. This action goes to the contract itself and not to the defendant's manner of reporting its performance of the contract. It goes rather to whether or not defendant has performed. This is not a matter of accounting but a matter of law for a court to determine, and it was never contemplated by the agreement that such serious and weighty issues of law should be resolved by certified public accountants.

III.

None of the Issues in This Action Are Referable to Arbitration Under the Agreement.

If it be assumed for the purpose of argument that the contract contains an agreement for arbitration, then it becomes necessary to determine whether any of the issues in the instant case are within the arbitration clause.*

The Court will note that the arbitration clause is limited to controversies "as to any accounting by Purchaser with respect to the share of Pictures in the net profits of the picture."

None of the issues in the present action is referable to the accounting. All issues go solely and exclusively to a

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*Title 9, U. S. Code, Sec. 3, specifically provides that the Court must be "satisfied that the issue involved . . . is referable to arbitration under such an agreement. . . ." (See Appendix "A.")

breach of contract or a repeated series of contractual breaches, perpetrated by the defendant. The issues raised by the Complaint are not issues of accounting, but issues of contract law.

The Court's attention is invited once more to Title 9, U. S. Code, §3, which provides for a stay of proceedings if a suit is brought "upon any issue referable to arbitration." If we assume *arguendo* that the contract involves commerce, and is one for arbitration and had plaintiff questioned the accuracy of accountings, it would follow that a stay would be in order. But here, apart from other considerations, the accuracy of the accountings is not challenged and there can be no stay, since none of the issues is referable to arbitration.

IV.
Appellee Is in Default in Proceeding With Arbitration.

The Court's attention is once more invited to the language of Section 3 of the United States Arbitration Act (9 U. S. C. §3). The Act is explicit in stating that an applicant for a stay of proceedings pending arbitration is not entitled to a stay if he is in default in proceeding with the arbitration.

Under the circumstances as related in the affidavit of Stuart L. Kadison [Tr. p. 57], the appellee is in default in proceeding with the arbitration and cannot, in view of such default, seek a stay of judicial proceedings.

See:

American Locomotive Co. v. Chemical Research Corp., 171 F. 2d 115 (6 Cir., 1948);

Radiator Specialties Co. v. Canon Mills, 97 F. 2d 318 (4 Cir., 1938).

The Court's attention is invited to the fact that the issues mentioned in said affidavit are not the issues raised by the complaint.

Conclusion.

It is respectfully submitted that the court below erred in granting appellee's motion for a stay of proceedings. More particularly, it erred in finding applicable the United States Arbitration Act, the contract in question not being a contract in interstate commerce. It further erred in determining that the agreement was one for arbitration and, assuming that it was correct in such determination, it erred in determining that all or any of the issues of the present case were referable to the arbitration agreement. Finally, there was error in granting a stay to the appellee who was in default in proceeding with the arbitration.

The effect of the errors below, unless corrected by this Court, will be to require appellant to litigate substantial questions of law relating to the construction of a complex and involved agreement before certified public accountants in the City of New York.

We respectfully submit that the errors of the court below should be corrected and the case returned for a trial on the merits.

Pacht, Ross, Warne & Bernhard,
By Isaac Pacht,
Stuart L. Kadison,
Attorneys for Appellant.

APPENDIX A.

The provisions of the Federal Arbitration Act (Title 9, U. S. Code, §1 *et seq.*) pertinent to this appeal, are set out below for the convenience of the Court.

1. " 'Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."